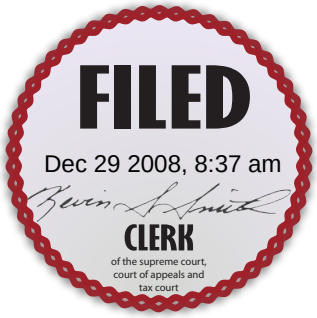

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A03-0806-CR-310
	)	
ANTHONY J. COHEE,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Kenneth R. Scheibenberger, Judge
Cause No. 02D04-0707-FD-609

December 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The State appeals the trial court's grant of Anthony J. Cohee's ("Cohee") motion to suppress evidence found during execution of a search warrant. We affirm.

Issue

The State presents the sole issue of whether the trial court abused its discretion in granting Cohee's motion to suppress.

Facts and Procedural History

In the morning of July 17, 2007, a confidential informant ("C.I.") contacted the Ft. Wayne Police Department ("F.W.P.D."). The F.W.P.D. had previously communicated with the C.I., but no arrests had been made based upon the C.I.'s information. He/she told F.W.P.D. Detective Brian Martin ("Det. Martin") that a "brick" or kilogram of cocaine, stamped with an "H," could be found in a cooler at a car lot, either in one of the cars or in the mobile-home office. Appendix at 36 and Transcript I at 11. The C.I. also stated that Cohee possessed the cocaine. Conducting surveillance of the lot, Det. Martin saw Cohee exit the office and leave the lot in a vehicle with another person. In coordination with the investigation, officers in two police cars then stopped the car for a traffic infraction. Upon request, Cohee exited the vehicle. The officers asked Cohee to return to the car lot. He did so.

Once back at the car lot, a canine team investigated the exteriors of the cars and the office. Canine Nemo showed interest in the rear of a vehicle and the northeast corner of the office, but he did not alert. Shortly after 2:00 p.m., a second canine team was then called to

investigate. Canine Justice positively alerted at the rear of the same vehicle and showed interest in the northeast corner of the office, but as with Nemo, did not alert at the office. A search of the vehicle's trunk, as allowed by Cohee, revealed no contraband. Det. Martin then spoke again to the C.I., who stated that he/she last saw the cocaine in a cooler in the office.

F.W.P.D. Sergeant Thomas Strausborger ("Sgt. Strausborger") spoke with Cohee during the investigation and described their conversation as follows:

> A: [Cohee] came back to the car lot . . . at which time I spoke with Mr. Cohee.
>
> Q: Okay. Did you advise Mr. Cohee of his rights?
>
> A: At that point in time, we didn't have any criminal charges against him.
>
> Q: So the answer is he was not advised of his rights?
>
> A: Not when I first engaged with him, but yes, eventually, I did advise him of his Miranda warning.
>
> Q: Where did – Where did that occur? Where?
>
> A: In front of the business.
>
> Q: Okay. And did [Cohee] make any statements?
>
> A: Nothing really. He was asking me – He kept asking me if he should call his lawyer, what he should do, you know. He was confused. He was scared. I told him that it's not my position to give him legal advice.

Tr. I at 69-70. Ultimately, Det. Martin left the car lot to begin the process of seeking a search warrant. According to Sgt. Strausborger, he continued to speak with Cohee while Det. Martin was preparing the search warrant affidavit:

Q: And did you have some discussions with the defendant at that point where he volunteered some statements to you?

A: Basically, what had happened was we had the – we had our original tip. We had the description of the vehicles. We had a K-9 show up and do a [sic] outer sniff of the vehicles. I was informed that there was an alert on one of the vehicles, and with the totality of the circumstances, we were asking if we could get inside. He advised that we were not going to be allowed to go inside. He didn't know what to do and was kind of ho humming back and forth. At that point, I said, "I believe that we have enough to go ahead and submit for a search warrant." I told him at that point in time when we decided that we were done with him and we were going to get a search warrant, I had – I don't remember exactly if it was Detective Gigli place him in handcuffs and he was detained at that point in time while we went – we got the search warrant. He was no longer free to leave at that point.

Q: Okay. But only at that point.

A: Only at that point.

Q: Okay. And did he make any statements at that point?

A: Once I said that we were going to go ahead and get the search warrant and that we were on our way to go, he basically looked at me and I don't – I wrote down – or the specifics around the search warrant, but it was something to the effect of "It doesn't matter anyway. I'm screwed."

Q: Okay. If in the search warrant – In the search warrant affidavit, in quotes, it says, "I know I'm screwed. I know I'm in a lot of trouble." Is that an accurate . . .

A: That would be correct.

Q: That's what he said?

A: Yes.

Q: And you related that statement to the officers who were putting together the affidavit. Is that correct?

A: That's correct. And I wasn't the only one standing there. There were other officers standing around as the statement was made.

Tr. I at 75-76; App. at 37. Det. Martin included the statement in his search warrant affidavit.

At 4:15 p.m., a search warrant for the office was issued, pursuant to which the F.W.P.D. entered and found 450 grams of marijuana, but no cocaine, in a cooler in the office. The State charged Cohee with possessing more than thirty grams of marijuana. Cohee filed a motion to suppress the marijuana. After an evidentiary hearing, the trial court granted Cohee's motion. Consequently, the State dismissed the charge.

The State now appeals.

Discussion and Decision

I. Standard of Review

Where a party appeals the grant of a motion to suppress, it appeals from a negative judgment and must show that the ruling on the motion was contrary to law. State v. Keller, 845 N.E.2d 154, 161 (Ind. Ct. App. 2006).

> We reverse only where the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. We treat the review of a motion to suppress in a fashion similar to instances in which the sufficiency of the evidence is challenged. To this end, we will not reweigh the evidence or judge witness credibility, and consider the evidence most favorable to the trial court's ruling. In doing so, "we must review the totality of the circumstances, thereby requiring this court to review all the facts and circumstances that are particular to this case." We will disturb the trial court's ruling on a motion to suppress only upon a showing of abuse of discretion.

Id. at 160-61 (quoting Bell v. State, 818 N.E.2d 481, 484 (Ind. Ct. App. 2004), trans. denied) (citations omitted).

II. Analysis

The State argues that the C.I.'s tip, the results of the canine searches, and Cohee's voluntary statement collectively established probable cause to support issuance of the search warrant. In its order, the trial court reasoned as follows: "Since neither canine 'alerted' on the trailer and since the reliability of the informant was not provided, the Court finds that the search warrant was issued without sufficient probable cause." App. at 41. The trial court's order made no reference to Cohee's statement. Thus, while the trial court must have concluded that the statement could not be considered for purposes of analyzing probable cause, it was not clear upon what basis the trial court made its decision.

In its brief, the State dedicates one paragraph to Cohee's statement, arguing that it was self-incriminating and volunteered.[1] The State is silent, however, regarding whether Cohee was in custody and whether he had been advised of his Miranda rights when he made the statement. Meanwhile, Cohee contends that he was in custody and had not been Mirandized at the time of his statement. Therefore, he argues that the statement was obtained in violation of his Fifth Amendment privilege against self-incrimination, and cannot support the issuance of a search warrant.

"The Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during 'custodial interrogation' without a prior warning." Ritchie v. State, 875 N.E.2d 706, 716 (Ind. 2007) (citations omitted), reh'g denied. "Police

[1] The State did not submit a reply brief.

officers are not required to give Miranda warnings unless the defendant is both in custody and subject to interrogation." Id.

At some point, Cohee was handcuffed and advised of his Miranda rights. However, the trial court was silent and the record was ambiguous regarding the order in which Cohee made the statement, was in custody, and was Mirandized. On appeal, the State asserts that, upon returning to the car lot, Cohee was "placed under no restrictions and Defendant was not handcuffed." Appellant's Brief at 3. In response, Cohee contends that he "was handcuffed and placed in the rear of a squad car" before the first canine unit arrived. Appellee's Brief at 3 (citing Exhibit D).

Exhibit D is a grainy video recorded by the car lot's surveillance camera. During a canine search, a man in dark pants and a striped shirt ("Suspect") exited the back of a four-door sedan. He appeared to be handcuffed. After a few minutes outside of the car, including some time standing with a canine unit, an officer led the Suspect back to the sedan and helped him get into the back seat. The Suspect remained in the sedan for approximately a half hour. During this time, there were several officers in proximity to the sedan. It appears that an officer then removed the Suspect from the car and uncuffed him. The Suspect and multiple officers remained at the car lot. One hour and thirty-four minutes into the video, an additional officer returned to the lot and spoke with the Suspect. Nine minutes later, a fourth police vehicle entered the lot. A fifth arrived one minute later. At that point, one hour and forty-four minutes into the video, amid five police cars and within a few feet of at least three officers, the Suspect appeared to be placed in handcuffs and into a police car. The video did

not include the time spent during the traffic stop, which occurred elsewhere.

In testifying, Sgt. Strausborger acknowledged that "[t]here were other officers standing around as [Cohee's] statement was made." Tr. I at 76. According to the officer, his statement that the police had probable cause for a search warrant, handcuffing Cohee, and Cohee's statement occurred in rapid succession. Finally, the evidence did not establish when Sgt. Strausborger advised Cohee of his Miranda rights. Viewing the video and the other evidence in the light most favorable to the judgment, the record supported a reasonable inference that Cohee was in custody and had not been Mirandized when he made the self-incriminating statement. We therefore address whether Cohee was subject to interrogation when he made the statement.

As recently as 2007, the Indiana Supreme Court relied upon the analysis in Rhode Island v. Innis for determining whether a suspect was subject to interrogation. Ritchie, 875 N.E.2d at 717. Innis was suspected of using a shotgun to commit a crime. As a search for the shotgun was being conducted, two officers were transporting Innis to a police station. The officers discussed their concerns that the neighborhood contained a school for handicapped children and that one of them could hurt herself by finding a loaded gun. In response, Innis led officers to the hidden shotgun. The Innis Court analyzed the issue as follows:

> We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the

> police should know are reasonably likely to elicit an incriminating response from the suspect. . . .
>
> Turning to the facts of the present case, we conclude that the respondent was not "interrogated" within the meaning of Miranda. It is undisputed that the first prong of the definition of "interrogation" was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.
>
> Moreover, it cannot be fairly concluded that the respondent was subjected to the "functional equivalent" of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.
>
> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

Rhode Island v. Innis, 446 U.S. 291, 301-03 (1980) (footnotes omitted).

As with the police conduct in Innis, Sgt. Strausborger's comment that probable cause had been established was clearly not express questioning. We therefore apply the Innis test for whether police conduct was the functional equivalent of questioning, considering: (1) the

defendant's state of mind ("disoriented or upset") at the time he made the self-incriminating statement; (2) the duration and aggressiveness of the officers' interaction with the defendant; (3) and how "evocative" the officers' comments were. Id. "Evocative" means "1. serving or tending to evoke or call forth something . . . 2a. tending to evoke an emotional response." WEBSTER'S THIRD NEW INT'L DICTIONARY 789 (2002) (emphasis added).

Indiana appellate courts have had several occasions to apply the Innis test. Routine police communications, silence, and reflexive responses do not constitute the functional equivalent of questioning. See White v. State, 772 N.E.2d 408, 412 (Ind. 2002); Hopkins v. State, 582 N.E.2d 345, 349 (Ind. 1992); and McClure v. State, 803 N.E.2d 210, 212 (Ind. Ct. App. 2004), trans. denied. Compare the following two cases. In Alford v. State, as an officer confronted Alford in an interrogation room with a list of incriminating evidence, the defendant confessed to murder. Alford v. State, 699 N.E.2d 247, 250 (Ind. 1998). In Furnish v. State, after pursuing on foot and detaining Furnish, officers searched the defendant, found bank-wrapped cash in his boots, and asked "damn, Delbert, where'd you get all the money." Furnish v. State, 779 N.E.2d 576, 581 (Ind. Ct. App. 2002), trans. denied. Alford and Furnish were each found to have been subject to interrogation. Therefore, under Miranda and Innis, their statements could not support a determination of probable cause.

Effectively, these cases distinguished standard police communication from lengthy, pressured, and/or substantive conversations between the officer and the defendant. In Alford, the defendant was in an interrogation room. In Furnish, the defendant was handcuffed and being searched after fleeing the scene on foot at 4:20 a.m. The officer's monologue in

Alford was clearly applying pressure, while the officer's question in Furnish ("where'd you get all the money") addressed the very elements of the offense ultimately charged.

Here, by the State's own admission, Cohee was "confused," "scared," seeking Sgt. Strausborger's advice, and "didn't know what to do and was kind of ho humming back and forth." Tr. I at 70 and 75. Thus, the record supports the reasonable inference that Cohee was, in the Innis Court's words, disoriented and upset. This state of mind was precipitated by an encounter with multiple police lasting multiple hours. At least seven officers were at the car lot at some point, including two detectives, the two officers who performed the traffic stop, Sgt. Strausborger, and two canine teams. Finally, Sgt. Strausborger asked Cohee for permission to enter the office. Cohee declined. Sgt. Strausborger responded with what he should have understood to be an evocative statement: "I believe that we have enough to go ahead and submit for a search warrant." Tr. I at 75. In other words, the police would go precisely where Cohee did not want them to be. And, alas, Cohee provided an emotional response, the content of which was used, in part, to obtain a search warrant.

We will reverse the judgment only if the evidence is without conflict and all reasonable inferences lead to a conclusion opposite that reached by the trial court. State v. Eichhorst, 879 N.E.2d 1144, 1148 (Ind. Ct. App. 2008), reh'g denied, trans. denied. Under Innis, the duration and intensity of the investigation, the defendant's state of mind, the length of Sgt. Strausborger's communication with Cohee, and the significance of the officer's statement, collectively, support the reasonable inference that Cohee was under interrogation. Therefore, his statement could not support the issuance of a warrant.

The State does not argue that the confidential tip and the canine searches supported issuance of the warrant, even absent Cohee's statement. Nonetheless, there was evidence to support the trial court's findings. As to the tip, the trial court found that no information from the C.I. had resulted in any arrests and that the officers had not established the C.I.'s reliability. In testifying, Detective Kim Seiss confirmed that while she had previously met with and received information from the C.I., no arrests had been made based upon the C.I.'s information.

Regarding the canine searches, the State's evidence was clear that the first canine showed interest in the trunk and the office, but did not actually alert at either. Although the second canine alerted on the trunk and showed interest in the office, a search of the trunk revealed no contraband. Thus, there was evidence to support the trial court's finding that neither canine alerted at the office.

Conclusion

The trial court did not abuse its discretion in granting Cohee's motion to suppress.

Affirmed.

MATHIAS, J., and BARNES, J., concur.